Lim Bee Kee v Leong Ah Chuan

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S6–47–442 OF 1988
MOHD NOOR AHMAD J
10 OCTOBER 1997

Family Law *— Financial obligation — Maintenance payment — Change of circumstances — Variation of — Whether there had been material change in the circumstances since the making of the order for maintenance — Whether respondent had made full disclosure of his financial circumstances — Whether the attitude of the respondent in placing more emphasis on his second family was wrong — Whether it should be considered that a second marriage was entered into subject to the liability to support the wife and children of the first dissolved marriage — Law Reform (Marriage and Divorce) Act 1976 s 47*

The petitioner and the respondent were divorced on 23 October 1989 and a maintenance order for RM200 per month was made for the petitioner and their children. The respondent entered into a second marriage and had three more children. On 20 April 1993, the court varied the maintenance from RM200 to RM600 per month. The respondent in the present application sought to reduce the maintenance from RM600 to RM300 per month, stating that there had been a material change in financial circumstances, ie: (i) the income from his business had decreased as a result of the burning down of his factory in 1991 and therefore he had to charge his half share in a landed property to obtain an overdraft facility for the purpose of the business; (ii) he has three children and the present wife to support; he incurred heavy expenses for the treatment of the wife who is suffering from epilepsy; and (iii) he had to make monthly repayment towards a loan which he took to pay the arrears of maintenance to the petitioner under a court order.

Held, dismissing the application:

The onus was on the respondent to prove that there had been material change in the circumstances since the making of the order for maintenance. The first two grounds tendered by the respondent were the same grounds advanced when opposing the petitioner's application for increase of the maintenance in 1993 and therefore it could not be reasonably determined that there had been material change in those respects (see p 678G–H).

Furthermore, the court could not make a reasonable determination in the application as there was no full disclosure of the respondent's income, expenses, value of his charged property and his available overdraft facility to support his alleged inability to pay the ordered maintenance. As he failed to make the necessary disclosures, the court was entitled to draw inferences contrary to his income and assets (see pp 678I and 679A–F); *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 followed.

It was evident in this case that the respondent placed more emphasis on the second family than on the first. This attitude was wrong as a second marriage must be entered into subject to the liability to support the wife and children of a dissolved marriage. The court should not ignore the just claims of the first wife because the husband has taken on other obligations, although the court must take into account those obligations as involving a reduction in the capacity of the husband to pay towards the upkeep of his first wife. As the respondent failed to make full disclosure, the court was not in a position to consider the other obligations at this juncture (see p 679G–H); *Cowie v Cowie* (1983) 13 Family Law 250 and *Roberts v Roberts* [1970] P 1 followed.

[Bahasa Malaysia summary

Pempetisyen dan penentang telah bercerai pada 23 Oktober 1989 dan satu perintah penyenggaraan sebanyak RM200 sebulan telah dibuat untuk pempetisyen dan anak-anak. Penentang telah berkahwin semula dan mempunyai tiga orang anak lagi. Pada 20 April 1993, mahkamah telah mengubah penyenggaraan daripada RM200 kepada RM600 sebulan. Penentang dalam permohonan ini memohon supaya penyenggaraan dikurangkan daripada RM600 kepada RM300 sebulan, dengan menyatakan bahawa terdapat perubahan yang material dalam keadaan kewangan, iaitu: (i) pendapatan daripada perniagaannya telah jatuh akibat kebakaran kilang yang berlaku pada tahun 1991 dan oleh itu beliau terpaksa menggadai setengah bahagiannya dalam hartanah bagi memperolehi kemudahan overdraf untuk tujuan perniagaan; (ii) beliau harus menyara tiga orang anak dan isteri; beliau telah menanggung perbelanjaan yang banyak untuk rawatan isteri yang menghidap penyakit epilepsi; dan (iii) beliau harus membuat bayaran balik bulanan untuk pinjaman yang diambil bagi membayar tunggakan penyenggaraan kepada pempetisyen di bawah satu perintah mahkamah.

Diputuskan, menolak permohonan:

Beban terletak pada penentang untuk membuktikan bahawa terdapat perubahan material dalam keadaan sejak pembuatan perintah penyenggaraan. Dua alasan pertama yang dikemukakan oleh penentang adalah alasan sama yang dibentangkan ketika membantah terhadap permohonan pempetisyen supaya penyenggaraan ditambahkan pada tahun 1993 dan maka tidak boleh dipastikan secara munasabah bahawa terdapat perubahan material dalam hal-hal tersebut (lihat ms 678G–H).

Tambahan pula, mahkamah tidak dapat membuat penentuan yang munasabah dalam permohonan oleh kerana tiada pendedahan penuh tentang pendapatan, perbelanjaan, nilai harta yang bercagar dan kemudahan overdraf penentang yang ada bagi menyokong ketidakmampuan penentang yang dikatakan untuk membayar penyenggaraan yang diperintahkan. Oleh kerana beliau telah gagal

membuat pendedahan yang perlu, mahkamah berhak membuat inferens yang bertentangan dengan pendapatan dan asetnya (lihat ms 678I dan 679A–F); *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 diikut.

Adalah jelas dalam kes ini bahawa penentang memberikan perhatian yang lebih kepada keluarga kedua daripada keluarga pertama. Sikap ini adalah salah kerana perkahwinan kedua mestilah diikat tertakluk kepada liabiliti untuk menyara isteri dan anak perkahwinan yang dibubarkan. Mahkamah tidak harus mengabaikan tuntutan berasas isteri pertama hanya kerana si suami memikul obligasi lain, walaupun mahkamah mesti mengambil kira obligasi-obligasi yang melibatkan pengurangan dalam keupayaan si suami untuk membayar senggaraan isteri pertama. Oleh kerana penentang telah gagal membuat pendedahan penuh, mahkamah bukanlah dalam kedudukan untuk mempertimbangkan obligasi-obligasi lain di peringkat ini (lihat ms 679G–H); *Cowie v Cowie* (1983) 13 Family Law 250 dan *Roberts v Roberts* [1970] P 1 diikut.]

Notes

For cases on maintenance, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1997–2060.

Cases referred to

Cowie v Cowie (1983) 13 Family Law 250 (folld)
Leow Kooi Wah v Philip Ng Kok Seng & Anor [1997] 3 MLJ 133 (folld)
Newton v Newton [1990] 1 FLR 33 (refd)
Roberts v Roberts [1970] P 1 (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 47

Goh Sen Fong (*Mah Weng Kwai & Associates*) for the respondent.
Chew Swee Yoke (*SY Chew & Co*) for the petitioner.

Cur Adv Vult

Mohd Noor Ahmad J: The respondent seeks, inter alia, to vary the maintenance order of 20 April 1993 from RM600 to RM300 per month on the ground that there had been material change in the circumstances.

The marriage between the respondent and the petitioner produced two children aged 17 years and 14 years. They were divorced on 23 October 1989 and a consent order for the maintenance of the petitioner and the children in the sum of RM200 per month was made. Thereafter, the respondent remarried and was blessed with another three children aged 6, 7 and 8 years. On 24 July 1992, the petitioner applied for an increase of the maintenance from RM200 to RM1,500 per month. However, on

20 April 1993 the court varied the maintenance from RM200 to RM600 per month. Now, the respondent applies for the maintenance to be reduced to RM300 per month.

The respondent advanced the following grounds to justify his application:

(i) His furniture business and the income from the business had decreased as a result of the burning down of his factory on 6 October 1991. He exhibits the notice of assessment for 1991 and the notice of additional assessment for 1993 in support thereof. He had charged his half share in a landed property to obtain an overdraft facility for the purpose of the business.

(ii) He has three children and the present wife to support. The wife is permanently suffering from epilepsy and she is unable to work. He incurs heavy expenses for the treatment of the wife and has been advised to send her for treatment in America which will cost about RM500,000 which he cannot afford.

(iii) He borrowed RM9,900 from MBf Finance Bhd backed by fixed deposit receipts to pay the arrears of maintenance to the petitioner under a court order. The monthly repayment towards the loan is RM210.

Therefore, he is not in a position to pay the monthly maintenance of RM600 to the petitioner.

Briefly, the petitioner contended that the respondent is doing well in his business including his involvement in three other concerns. Some photographs allegedly showing some workers of the respondent, the result of a search made at the RIMV and business cards of the respondent are exhibited in support thereof. Her average monthly expenses as itemized is RM2,348.50. With her monthly income of about RM800 as a seamstress, she is unable to meet the daily needs of the family.

(1) It is trite that the onus is on the respondent to prove that there has been material change in the circumstances since the making of the order for maintenance.

(2) I am of the view that grounds (i) and (ii) are stale because the same grounds, except for the advice on medical treatment in America, were advanced by the respondent when opposing the petitioner's application for increase of the maintenance in 1993. Hence, it cannot be reasonably determined that there has been material change in those respects.

(3) Be that as it may, the respondent does not make full disclosure of the following matters to enable me to make a real determination on his alleged inability to pay the maintenance as ordered:

(i) his monthly income;

(ii) the date when the landed property was charged, the amount of the overdraft facility obtained and the amount utilized and the amount or rate of interest paid on the overdraft facility;

(iii) the market value of the landed property charged and the percentage of the overdraft facility obtained in relation to the market value; and

(iv) his monthly expenses.

Those particulars are necessary for the purpose of not only to determine the amount of maintenance he will be able to pay after deducting all the reasonable expenses from his income but also of whether he is able to raise additional credit on the landed property charged to meet his obligations towards the maintenance order. In the absence of these facts and the facts on the willingness or otherwise of the chargee to grant the additional credit, it is reasonable for me to hold that it is reasonably practicable for the respondent to find a way to pay the maintenance by obtaining further credit (see *Newton v Newton* [1990] 1 FLR 33). The application of the principles as practised by the English courts in matrimonial proceedings is preserved by s 47 of the Law Reform (Marriage and Divorce) Act 1976. The respondent contended that his business and the income from the business had decreased since the fire. He should have produced the annual statements of account of his business to support the contention which he could have done easily but he did not. Instead, he merely produced the notice of assessment for 1991 probably to show his income before the fire but failed to produce the notices of assessment for the years subsequent to the fire. Though he produced the notice of additional assessment for 1993, to my mind, this is no good at all to his case because this is an additional assessment for 1993. What about the original assessment for 1993? On the contrary, it is reasonable to presume that his income had increased and that's why he was imposed with the additional assessment for 1993. As he failed to make the necessary disclosures under the divorce and matrimonial proceeding, the court is entitled to draw inferences contrary to his income and assets (see *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133).

(4) With regard to the respondent's second marriage, it is evident that he has placed more responsibility on the second family than on the first. This attitude is wrong. In *Cowie v Cowie* (1983) 13 Family Law 250 and in *Roberts v Roberts* [1970] P 1, it was held that a second marriage must be entered into subject to the liability to support the wife and children of a dissolved marriage. The court should not ignore the just claims of the first wife because the husband has taken on other obligations, although the court must take into account those obligations as involving a reduction in the capacity of the husband to pay towards the upkeep of his first wife. In the case before me, as the respondent failed to disclose those matters as stated above, I am not in a position to consider the other obligations at this juncture.

Therefore, I am satisfied that the respondent has failed to prove on the balance of probabilities that there has been material change in the circumstances since the making of the order for maintenance. As the respondent has failed to do so, the petitioner is not required to disprove anything. Therefore, I need not consider the petitioner's assertions on the

present state or status of the respondent's business including the workforce and photographs exhibited and the respondent's other businesses. That being the case, I will not touch on the issue of hearsay evidence in the petitioner's affidavit as alleged. In fact, the necessary monthly expenses of the petitioner and the children as itemized are very much in excess of the amount of maintenance ordered even if her monthly income of RM800 is to be considered.

Therefore, the application is hereby dismissed with costs.

Application dismissed.

Reported by Sunita Sankey